



IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

JEFFREY S. CHRISTOPHER

Plaintiff,

v.

C.A. No. S12C-05-018-THG

SUSSEX COUNTY, a political subdivision of the
State of Delaware; MICHAEL H. VINCENT,
Sussex County Council President; SAMUEL R.
WILSON, Sussex County Council Vice President;
JOAN R. DEAVER, Sussex County Council
Councilwoman; GEORGE B. COLE, Sussex
County Council Councilman; VANCE C.
PHILLIPS, Sussex County Council Councilman;
TODD F. LAWSON, Sussex County
Administrator; and the STATE OF DELAWARE

Defendants.

**DEFENDANT STATE OF DELAWARE'S ANSWERING BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

**DEPARTMENT OF JUSTICE
STATE OF DELAWARE**

/s/ Edward K. Black

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NATURE AND STAGE OF PROCEEDINGS

Jeffery S. Christopher, Sheriff of Sussex County, Delaware (“Sheriff Christopher”), filed his Second Amended Complaint (the “Complaint”) against the Defendants for declaratory judgment challenging the constitutionality of certain statutory amendments contained in 78 Del. Laws, c. 266 §§ 1-23 (2012) (“HB 325”). The State of Delaware (the “State”) has been joined as a party, and the Attorney General is entitled to be heard in this action, pursuant to 10 *Del. C.* § 6511. This Court has subject matter jurisdiction pursuant to 10 *Del. C.* § 6502.

On September 19, 2012, Sheriff Christopher filed a Motion for Summary Judgment. The State filed its Cross-Motion for Summary Judgment on September 21, 2012. Sussex County, Michael H. Vincent, Samuel R. Wilson, Joan R. Deaver, George B. Cole, Vance C. Phillips, and Todd F. Lawson (collectively, the “Sussex Defendants”) filed their Cross-Motion for Summary Judgment on October 23, 2012. The parties filed simultaneous Opening Briefs on October 26, 2012. This is the State’s Answering Brief in opposition to Sheriff Christopher’s Motion for Summary Judgment.

STATEMENT OF THE FACTS

The facts of the case are brief. Sheriff Christopher is the duly elected Sheriff of Sussex County, a political subdivision of the State. On June 14, 2012, the General Assembly passed HB 325, the terms of which make clear that, under the law of the State, “county sheriffs and their deputies do not have arrest authority.” Sheriff Christopher claims that, because the current Delaware Constitution (the “Constitution”) names sheriffs as “conservators of the peace” within their respective counties, he and his deputies have absolute, immutable power to make arrests and enforce the laws of the State, “among other *common law* rights and prerogatives,”¹ unless the Constitution is amended to exclude sheriffs as “conservators of the peace.” He therefore claims that the restrictions contained in HB 325 are unconstitutional. The State disagrees.

¹ Complaint ¶69 (emphasis added). See, also, Complaint ¶60 (“ . . . all of the *common law* rights, duties, and prerogatives inhering thereto”) (emphasis added).

QUESTIONS PRESENTED

1. Are the powers and duties of county sheriffs defined by the Constitution?
2. If the powers and duties claimed by Sheriff Christopher are not defined by the Constitution, can the General Assembly alter them through legislation?

ARGUMENT

I. SHERIFF CHRISTOPHER IS *NOT* THE CHIEF LAW ENFORCEMENT OFFICER OF SUSSEX COUNTY.

A. The Constitution of Delaware Does Not Confer Any Specific Powers on the Office of Sheriff.

1. Sheriff Christopher Relies Upon the Wrong Standard for Constitutional Interpretation.

Sheriff Christopher urges the Court to interpret the term “conservator of the peace” in accordance with his notion of the “ordinary and plain meaning of the words,” citing *State ex rel. Oberly v. Troise*, 526 A.2d 898 (Del. 1987) in support of that proposition. Pl. Br., p. 13. *Troise* does not stand for that proposition. Instead, the *Troise* court said:

Generally, resort to constitutional history or construction is not appropriate where the language of the constitution is clear and unequivocal. Constitutional phrases must, if possible, be given their ordinary or plain meaning. Courts are called upon to construe the language of the constitution only when it is in some way obscure or doubtful in its meaning. Nevertheless, in light of the concerns expressed by this Court in *Killen*, we deem it advisable to consider whether the Delaware constitutional debates offer evidence which might support action by this Court to apply a judicial remedy inconsistent with the ordinary meaning of the express language of article III, § 9.

Id. at 902 (citations and footnote omitted). *Troise*, then, stands as an example of a situation in which the Delaware Supreme Court interpreted language in its historical context, rather than in accordance with one party’s notion of “clear and unequivocal” language.

More recently, the Delaware Supreme Court was called upon by the Governor to provide an opinion regarding the correct interpretation of language in the current Constitution. The court said:

Accordingly, to understand the word "heretofore" in the present Delaware Constitution, one must refer to the Delaware Constitutions of 1831, 1792 and ultimately to the retention of the common law right provided for in Delaware's 1776 Constitution. The purpose of this brief reference to the Delaware Bill of Rights is to illustrate the significance of knowing the original text, context and evolution of any phrase that appears in the present Delaware Constitution.

In re: Request by the Governor for an Advisory Opinion, 905 A.2d 106, 108 (Del. Supr. 2006) (footnote omitted, emphasis added). Here, the term “conservator of the peace” is anything but “clear and unequivocal.” Sheriff Christopher in his Opening Brief is reduced to defining “conservator of the peace” by tautology; “peace officer” is also termed as “conservator of the peace,” which is in turn defined as “peace officer.” Pl. Br., p. 16, n. 8.

All we know with certainty is that in 1897 the term “conservator of the peace” was not defined to include persons having the legal authority to conduct traffic stops, to engage in high speed pursuits, to place flashing lights on their horseless carriages, to access DELJIS, to conduct wiretaps, or to make arrests in any manner that was not also available to common citizens, nor was any such authority passed down from previous versions of the Constitution.

2. The Office of Sheriff Does Not Have Enumerated Constitutional Powers.

The powers and duties of constitutional officers, including sheriffs, derive first from the Constitution. To the extent that a power or duty is created by the explicit terms of the Constitution, it is subject to change only by constitutional amendment.²

The Delaware Constitution, from its earliest form, did not enumerate any specific powers of the office of Sheriff. The first Delaware Constitution, proclaimed on September 21, 1776, made mention of the office of Sheriff only in terms of the manner by which the sheriffs were to be appointed:

The sheriffs and coroners of the respective counties shall be chosen annually, as heretofore; and any person, having served three years as sheriff, shall be ineligible for three years after; and the president and privy council shall have the appointment of such of the two candidates, returned for said offices of sheriff and

² See, e.g., *American Legion Post No. 279 v. Barrett*, 20 N.E.2d 45, 51 (Ill. 1939) (“It is a rule frequently stated by this court, that the General Assembly may not take away from a Constitutional officer the powers or duties given him by the constitution.”)

coroner, as they shall think best qualified, in the same manner that the governor heretofore enjoyed this power.

Del. Const. art. XV (1776).

The term “conservator of the peace” first appears in the Del. Const. art. XII (1776), establishing judicial officers for the various counties:

The Members of the Legislative and Primary Councils shall be Justices of the Peace for the whole state during their continuance in trust; and the Justices of the Courts of Common Pleas shall be Conservators of the Peace in their respective counties.

Justices of the Courts of Common Pleas plainly had no powers of arrest or investigation beyond those of ordinary citizens. They were law enforcement officers only in the same sense that today’s judges are law enforcement officers. Under the circumstances, there simply is no possible construction of “conservators of the peace” as expressed in the Delaware Constitution (1776) that inherently gives the powers of arrest or of investigation to the sheriff as a “conservator of the peace” because the sheriff is not included among the officials defined in that document as a “conservator of the peace.”

3. Common Law Powers are Subject to Legislative Amendment.

The General Assembly may by statute limit the common law powers of a constitutional officer. In *Seth v. State*, 592 A.2d 436 (Del. Supr. 1991), the court was faced with a challenge to the Lend-a-Prosecutor Program then in effect, through which program private attorneys lent their services to the Attorney General for a period of approximately two weeks. The appellant, convicted of driving under the influence, argued that the Attorney General had exceeded his constitutional mandate by using private attorneys to conduct prosecutions (including the prosecution of the appellant), albeit under the supervision of the Attorney General.

The Court first examined the limits of the powers of constitutional officers:

The Attorney General is a constitutional officer vested with the broad authority to exercise numerous and varied powers. *Absent legislative restriction*, the Attorney General "may exercise all such power and authority as the public interests may from time to time require." The powers and duties of the chief law officer of the State can be modified by the General Assembly, which

can add to or subtract from the common law powers of the Attorney General. In the absence of legislation the authority and the duty of the Attorney General to appear in Court for the State or its immediate agencies has, I think, been universally recognized. If this authority is to be lessened or changed in any manner it should be done by express legislative action.

Seth v. State at 440, quoting *Darling Apartment Co. v. Springer*, 22 A.2d 397, 408 (Del. 1941) (Rodney, J., concurring) (citation omitted; emphasis added).³ It is clear, therefore, that the common law power and authority of a constitutional officer may be restricted or modified by legislation, and that the General Assembly can add to, or subtract from, his or her common law powers and duties. *Id.* at 440.

The rule described in Justice Rodney's concurrence in *Darling Apartment Co.* and adopted in *Seth* has been expressed in a variety of treatises and cases from various jurisdictions over the course of many years. The New Hampshire Supreme Court recently summarized them in its analysis of the constitutional office of sheriff,

"Where the sheriff is named in the Constitution his duties are the same as they were at the time the Constitution was adopted." His duties and authority, however, are not rendered unalterable by virtue of the sheriff being a constitutional officer. The sheriff's duties and responsibilities, "unless expressly prescribed by the state constitution, are not immutable or exclusive, but are subject to legislative alteration and control." "The legislature is entirely at liberty to increase, decrease, or modify the powers and duties incident to this position." Thus, the sheriff maintains his common law powers, duties and responsibilities as they were at the time the constitution was adopted, except insofar as they have been modified by

³ *Accord.*, *Darling Apartment Co. v. Springer*, 22 A.2d 397, 407 (Rodney, J., concurring) ("It would seem that no common law was ever adopted in this State, except such as might be altered by a future law of the Legislature. . . . *The common law powers inhering to an office are, at most, a part of the common law, and can rise no higher than their source.*") (emphasis added).

constitutional provisions or legislative enactments.

At common law, the sheriff was the chief law enforcement officer of the county. Generally, the sheriff's common law powers included conserving public peace, preserving public order, preventing and detecting crime, enforcing criminal laws by, among other things, raising a posse and arresting persons who commit crimes in their presence, providing security for courts, serving criminal warrants and other writs and summonses, and transporting prisoners. Although the sheriff retains his common law duties, the legislature has modified them.

Linehan v. Rockingham County Commissioners, 855 A.2d 1271, 1274-1275 (N.H. 2004)

(citations omitted).

B. The General Assembly Exercised Its Power to Define the Duties of the Sheriff.

The moment Sheriff Christopher asserts that the powers he claims for his office are found in the common law, he perforce admits that those powers are subject to change by the General Assembly *without* a constitutional amendment. *Seth* at 440. Of course, even an appeal to common law is unavailing because the duties of the sheriff immediately prior to the formation of the State were defined by statute.⁴ In fact, the existence of the Duke of York's Laws conclusively demonstrates that, even during the colonial period, the common law powers of the sheriff were subject to change by appropriate legislation. Any "inherent power" that might be claimed by Sheriff Christopher must be interpreted in this historical context. *In re: Request by the Governor for an Advisory Opinion*, 905 A.2d 106, 108 (Del. Supr. 2006).

The law of arrest in the State has long been governed by statute. *State v. Holland*, 189 A.2d 79, 82 (Del. Super. 1963), *aff'd* 194 A.2d 698 (Del. Supr. 1963). "Since the law of arrest in

⁴ See, George Stauton, Benjamin M. Nead, and Thomas McCamant, eds., *Charter to William Penn and Laws of the Province of Pennsylvania Passed Between the Years 1682 and 1700, Preceded by Duke of York's Law in Force from the Year 1676 to the Year 1682, with an Appendix* (Harrisburg: Lane S. Hart, State Printer, 1879), pp. 21-22, available at <http://books.google.com/books?id=tt4rAQAAIAAJ&printsec=frontcover&dq=duke+of+york's+book+of+laws&hl=en&sa=X&ei=NICJUIvyJdTO0QHssYCwCg&ved=0CDcQ6AEwAQ#v=onepage&q=duke%20of%20york's%20book%20of%20laws&f=true>, last accessed December 12, 2012.

this state is now regulated by statute whatever may have been the rule at common law ... is no longer material.” *Id.* at 82. The statutes authorizing “Arrest and Commitment” in Chapter 19 of Title 11 of the Delaware Code govern the procedure for arrest and detention of suspects in criminal investigations. Sheriffs and their deputies are expressly excluded from making arrests in criminal cases. 11 *Del. C.* §1901 (2).

In 1981, the General Assembly enacted Chapter 84 of Title 11 of the Delaware Code establishing a comprehensive regulatory scheme to train police officers. 63 *Del. Laws*, c. 31 (1981). The General Assembly excluded sheriffs and their deputies from this comprehensive training scheme and precluded anyone who did not meet the training requirements from enforcing the laws of the State.⁵ To eliminate any ambiguity concerning whether the office of the sheriff retains the power to arrest, the General Assembly enacted legislation in 2012 to clarify and specifically provide that no such power resides in that office. 78 *Del. Laws*, c. 266 (2012). This affirmative act of the General Assembly effectively extinguished any arrest powers that the sheriff might otherwise have claimed under the common law.⁶ This exercise of legislative authority to subtract from what are, at best, the common law powers and duties of the Office of Sheriff are well within the power granted to the General Assembly.

II. THE STATE POLICE ARE THE PRIMARY LAW ENFORCEMENT AGENCY THROUGHOUT THE STATE, INCLUDING SUSSEX COUNTY.

⁵ See also, *Kopko v. Miller*, 892 A.2d 766, 770 (Pa. 2006) (“It is incumbent on the legislature to specify that the Sheriffs are encompassed within the definition of ‘investigative or law enforcement officers’” . . .).

⁶ See also, *Kopko v. Miller*, 892 A.2d 766, 775 (Pa. 2006) (“Clearly, the ability of Sheriffs to arrest for felonies committed in their presence is not tantamount to their being ‘investigative or law enforcement officers’ for purposes of conducting electronic surveillance.”). *Kopko* both distinguished and partially abrogated *Commonwealth v. Leet*, 641 A.2d 299 (Pa. 1994). “Leet stands only for the principle that qualified sheriffs and their deputies may make **“arrests for motor vehicle violations which amount to breaches of the peace committed in their presence.”** *Kopko* at 774 (quoting *Leet* at 303, emphasis added in *Kopko*).

Sheriff Christopher incorrectly asserts that he is the chief law enforcement officer in Sussex County. The State Police are the primary law enforcement agency throughout the State. 11 *Del. C.* § 8302. The State Police have exclusive jurisdiction of the investigation of homicide, suicide, kidnapping, unlawful sexual intercourse, and attempts of those crimes, except within the incorporated limits of a municipality with an established police department. 11 *Del. C.* § 8302(a)(1)(2)(4-6). Further, the definition of “police officer” in Section 1911 of Title 11 of the Delaware code expressly excludes sheriffs and deputy sheriffs. Accepting Sheriff Christopher’s argument at face value, a sheriff and deputy sheriffs, without certification by the Delaware Council on Police training, would be responsible for the investigation of serious crimes in Sussex County, not the State Police.

The Affidavit of Major Charles J. Simpson of the Delaware State Police (Simpson Aff., Ex. A) details the organization of law enforcement resources currently available in Sussex County. The State Police and Sussex County entered into a Memorandum of Understanding (“MOU”) dated November 19, 2007 to establish force levels for a six year term in Sussex County and apportion the costs of the force allocation. (Simpson Aff. ¶ 3, 5). The MOU initially provided for a minimum level of 175 uniformed officers and that staffing level has increased to 187 in 2012. (Simpson Aff. ¶ 3).

Sussex County has paid the State Police \$1,274,321.52 in Fiscal Year 2010; it paid \$1,573, 203.00 in Fiscal Year 2011; and \$1,607,436.12 in Fiscal Year 2012 as its contribution to the cost of these law enforcement resources. (Simpson Aff. ¶ 4). As of December 6, 2012, there were 184 Troopers stationed in Sussex County; 83 at Troop 4 in Georgetown; 45 at Troop 5 in Bridgeville; and 56 at Troop 7 in Lewes. (Simpson Aff. ¶ 6).

In addition to the considerable State Police forces dedicated to Sussex County, there are 21 municipal police departments in Sussex County which employ 169 full-time officers and 19 part-time officers. The State Police coordinate with the municipal police departments on specialized investigations and evidence collection as well as dispatch services. (Simpson Aff. ¶ 7). The combined law enforcement resources of the State Police and municipal police in Sussex County do not suggest that Sheriff Christopher and his deputies, uncertified in police training, are necessary to protect the public safety in Sussex County.

III. THE SHERIFF IS ACCOUNTABLE TO THE COUNTY ADMINISTRATION.

The legislative enactment of the General Assembly under “home rule” subjects sheriffs to the administration of county governments. The county governments are authorized to direct, manage and control the business and finances of the respective counties. 9 *Del. C.* § 330. County governments are therefore empowered to set budgets and appropriations for county departments and officials. In addition to the appropriation power, county governments shall:

(2) Have full and complete jurisdiction over all matters and things now or hereafter vested by law in the county governments of the respective counties, or in, or appertaining to, the office of the county governing officials of each county; and

(3) Have and exercise every power, privilege, right and duty which belongs and appertains to the county governments of the respective counties, or to the office of the county governing officials of the county

9 *Del. C.* § 330(a)(2) and (3). The General Assembly has delegated to the counties the powers to administer the business of county government.

While Sheriff Christopher is an elected official, like the Register of Wills or any other elected county official, he does not stand separate and apart from the administration of the county government. A sheriff is a “county officer” under 9 *Del. C.* § 9101. Aside from the designation of “conservator of the peace,” the Delaware Constitution enumerates no specific

duties of the office. The General Assembly has enumerated several administrative duties of the office such as service of process and the administration of sheriff sales in Title 10 of the Delaware Code.

If Sheriff Christopher's premise that the General Assembly cannot define his arrest powers is accepted, not only would his significant duties under Title 10 be called into question, but so would the power of the General Assembly under Title 9 to delegate powers to county governments.

CONCLUSION

Sheriff Christopher admits in the Second Amended Complaint that the duties he claims as a "conservator of the peace" must be found in the common law. Regardless of the rules of constitutional construction used by the Court, since those purported powers are found in either statutory or common law, and not in the language of the Constitution itself, the General Assembly can add to, or subtract from, those powers. It inevitably follows that HB 325 is an appropriate exercise of legislative authority by the General Assembly. HB 325 should therefore be *declared* constitutional by this Court, and the Second Amended Complaint must be dismissed.

DEPARTMENT OF JUSTICE STATE OF DELAWARE

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